FILE COPY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS McGEE, JR., *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF AMICUS CURIAE ON BEHALF OF
RICHARD KENNETH LEGRANDE

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UNITED STATES OF AMERICA,
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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Movant, Richard Kenneth LeGrande, respectfully moves the Court for permission to file a brief *amicus curiae.*

Movant was indicted on July 1, 1970, in the Northern District of California on a charge of refusing to submit to induction in violation of Title 50 U.S.C. App. section 462. During the time that he was a registrant with Selective Service Local Board No. 57 he filed a timely claim for classification as a conscientious objector. The local board nevertheless classified him 1-A on June 11, 1968, without stating any reason for rejecting his claim. He did not take an administrative appeal. His case is presently scheduled for trial on January 21, 1971.

Movant is faced with the imminent risk that he may be deprived, by application of the rule requiring ex-

haustion of administrative remedies, of the right to defend himself against the criminal charge.

Counsel have obtained the written consent to the filing of an amicus brief both from the Solicitor General of the United States and from petitioner McGee. The originals thereof will be filed with the clerk of this Court, and copies are attached hereto as Appendix A and Appendix B.

The Petition for Certiorari does not discuss these questions: (1) whether the due process clause permits judicial forfeiture of a criminal defense without notice; (2) whether the due process clause permits imposition of criminal sanctions for violation of an unlawful administrative order. These questions were not reached in *McKart v. United States* (1969) 395 U.S. 185. It is of great importance that they be met and decided now. Never before have the Federal Courts suggested that, though innocent of the crime charged, persons may be convicted and imprisoned for reasons extraneous to their innocence or guilt. They do so now. It is a sad degradation of our traditional concepts of justice.

Dated, San Francisco, California,
November 30, 1970.

Respectfully submitted,
NATHAN S. SMITH,
JAMES G. SEELY, JR.,
MARVIN B. HAIKEN,
Attorneys for Amicus Curiae
Richard Kenneth LeGrande.

BRIEF OF AMICUS CURIAE

INTRODUCTION

In the case at bar, petitioner McGee was denied the right to defend himself against criminal charges. He was convicted for violation of an unlawful induction order. This result is based on his failure to take an administrative appeal when his local board rejected his claim for exemption as a conscientious objector.

The purpose of this brief is to raise the question whether the forfeiture of a criminal defense without notice deprives the defendant of his liberty without due process of law in violation of the Fifth Amendment.

I. THE MOST FUNDAMENTAL RIGHT UNIVERSALLY RECOGNIZED IN OUR JURISPRUDENCE IS THE RIGHT TO DEFEND AGAINST THE CHARGE OF CRIME.

The right to defend against the charge of crime is fundamental in our jurisprudence. The Fifth Amendment prohibits "deprivation of . . . liberty . . . without due process of law". The Sixth Amendment guarantees various procedural protections which are designed to effectuate that basic right in the context of criminal prosecution.

In draft prosecutions the right to defend by proof that the draft board acted illegally has been recognized for almost a quarter century. *Estep v. United States* (1946) 327 U.S. 114.[1]

[1]It is conceded *arguendo* that the scope of judicial review of draft board actions has been limited to defects which are jurisdictional, e.g., where the board's action has no basis in fact.

The court there found itself unable "to infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency." [327 U.S. at 121-22].

II. THERE IS NOTHING IN THE RECORD TO SUPPORT A FINDING THAT McGEE WAIVED HIS RIGHT TO DEFEND HIMSELF AGAINST SUBSEQUENT CRIMINAL CHARGES.

The court below affirmed McGee's conviction because of his "failure to appeal his I-A classification".[2] Its conclusion involves the concept that, by failing to take an administrative appeal, McGee waived his right to defend himself against subsequent criminal charges.

This conclusion cannot stand because the record is devoid of any evidence and devoid of any finding by the trial court that McGee waived that fundamental right.

The situation is governed by *Johnson v. Zerbst* (1938) 304 U.S. 458. In that case a prisoner sought habeas corpus on the ground that he had been convicted without the assistance of counsel for his defense. The District Court denied relief, the Court of Appeals affirmed, and the Supreme Court reversed. To the Government's argument that Johnson had waived his right to counsel, the court replied:

> There is insistence here that petitioner waived this constitutional right. The District Court did

[2]Petition for Certiorari, Appendix p. 12a.

> not so find. It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

The court remanded the case to the District Court for a determination as to whether Johnson competently and intelligently waived his right to counsel [at page 469].

The same principles are applicable here. We are informed by McGee's counsel that the issue of exhaustion of administrative remedies was never mentioned in the District Court. It necessarily follows that the District Court in McGee's case did not consider and made no finding upon the crucial question whether McGee intentionally relinquished his right to defend himself against criminal charges. His conviction cannot stand without such a finding by the District Court.[3]

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[3]If the court below applied a presumption that when McGee waived his administrative appeal he also waived his right to defend in the event of criminal charges, that presumption is objectionable on three grounds: (a) under *Johnson, supra,* and cases there cited, waiver of such a fundamental right is not presumed; (b) the fact presumed does not rationally follow from the premise; and (c) where a presumption is applied on appeal that was not applied in the trial court, the defendant is deprived of the opportunity to rebut the presumption.

III. ABSENT EVIDENCE AND FINDING OF WAIVER, THE FORFEITURE OF THE RIGHT TO PRESENT A CRIMINAL DEFENSE VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Fifth Amendment of the United States Constitution provides in part that no person shall "be deprived of life, liberty, or property, without due process of law". This provision, in its classic application, guarantees reasonable notice and opportunity to defend before criminal punishment is imposed:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence. *In re Oliver* (1948) 333 U.S. 257, 273.

The decision of the court below imposes criminal punishment for violation of an induction order while refusing to hear the defense that the order is illegal.[4] On its face the decision constitutes a departure from classic due process principles, absent evidence and finding that the right to present a criminal defense was waived.

McGee was duly notified, in accordance with Selective Service regulations, that he had the right to appeal his classification.[5] On the other hand, there is no evidence that the local board ever gave him any

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[4]The effect of the decision below is to create a new crime by judicial decree. Having conceded that McGee had established his right to exemption from military service [Petition for Certiorari, Appendix, p. 11a] the court below in effect imposes criminal punishment for the failure to appeal even though the Congress made the right to appeal optional with the registrant. [Military Selective Service Act of 1967, §10(b)(3).]

[5]Petition for Writ of Certiorari, Appendix pp. 3a-4a.

indication that an appeal was mandatory[6] or that unless he filed an appeal he might suffer the forfeiture of his constitutional right to defend himself in the event of a subsequent prosecution. Such a record is totally deficient of any basis for a conclusion that McGee even knew that he might lose, much less intended to waive, his right to judicial review of his classification in the event of a later criminal proceeding.

The decision below therefore rests on a proposition inconsistent with traditional standards of Anglo-American jurisprudence: that a person may by his conduct unwittingly forfeit the right to defend himself in court against subsequent criminal charges.

> There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal. [Justice Murphy, concurring opinion in *Estep v. United States* (1946) 327 U.S. 114, 131.]

IV. EVEN IF THE DEFENDANT IN A DRAFT CASE WAIVES HIS RIGHT TO DEFEND, DUE PROCESS FORBIDS THE IMPOSITION OF CRIMINAL SANCTIONS BASED ON THE VIOLATION OF AN UNLAWFUL ORDER.

The court below noted that McGee had filed with his local board a claim for exemption as a conscien-

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[6]Neither statute nor regulation suggests that an administrative appeal is ever mandatory. [Military Selective Service Act of 1967, §10(b)(3); 32 C.F.R. 1626.] *McKart v. United States* (1969) 89 S.Ct. 1657, 1663: "No registrant is required to appeal."

tious objector, and that the local board had rejected the claim without having any basis in fact for so doing.[7] The board's induction order was therefore unlawful. *Estep, supra.*

Since violation of an unlawful order is not a crime, no court should ever impose criminal sanctions for such violation, irrespective of whether the defendant has waived his right to defend.

A conviction so lacking in evidentiary support amounts to denial of due process. *Thompson v. Louisville* (1960) 362 U.S. 199; *Barr v. Columbia* (1964) 378 U.S. 146; *Shuttlesworth v. Birmingham* (1965) 382 U.S. 87; *Garner v. Louisiana* (1961) 368 U.S. 157.

CONCLUSION

For the foregoing reasons the judgment of conviction on count one (failure to submit to induction) should be reversed.

Dated, San Francisco, California,
November 30, 1970.

Respectfully submitted,
NATHAN S. SMITH,
JAMES G. SEELY, JR.,
MARVIN B. HAIKEN,
Attorneys for Amicus Curiae
Richard Kenneth LeGrande

(Appendices A and B Follow)

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[7]Petition for Certiorari, Appendix p. 11a.

Appendix A

Letterhead of
New York Civil Liberties Union

November 18, 1970

Nathan S. Smith, Esq.,
220 Bush Street, Room 976
San Francisco, California 94101

Re: *McGee v. United States*, No. 362
October Term, 1970

Dear Mr. Smith:

On behalf of petitioner, I hereby consent to your filing an *amicus curiae* brief in the above-captioned case.

Sincerely yours,
/s/ Alan H. Levine
Alan H. Levine

AHL:SK

Appendix B

Letterhead of
Office of the Solicitor General
Washington, D.C. 20530

November 25, 1970

AIR MAIL
Nathan S. Smith, Esq.,
220 Bush Street,
San Francisco, California 94104

Re: *McGee v. United States,* No. 362
October Term, 1970

Dear Mr. Smith,

In response to your letter of November 23, I hereby consent to your filing a brief amicus curiae in the above case.

Very truly yours,
/s/ Erwin N. Griswold
Erwin N. Griswold
Solicitor General